tubes, but the finished products because of the vertically integrated nature of the companies.

And as an example, paragraph 167 with respect to Samsung talks about the fact that the meetings involved not only the tube manufacturer entities, but also the finish product entities who were represented at the meetings as alleged with respect to Samsung and each of the other defendants.

And then finally paragraph 101, which is the paragraph that talks about how important the tube is in terms of the price of the finished product.

To dismember this complaint, to dismember this conspiracy, to ignore the totality of the circumstances which show that this is a conspiracy that affects both finished products and tubes would be to ignore reality, and that's what defendants are asking you to do, your Honor, with all due respect.

MR. LITWIN: Your Honor, I just have a few minutes to respond.

Interestingly enough, your Honor, Mr. Simon's presentation, I don't believe I heard the words Illinois Brick, not once. I'll have to check the record, but I think that's right. I did hear a lot about Associated General Contractors, or AGC. Mr. Yohai is going to be up here in a minute talking about that case.

The policies of AGC are not to be considered on an Illinois Brick motion. That was made abundantly clear by the Supreme Court in Kansas v. Utilicorp where it says even if some of the economic assumptions that underlie the Illinois Brick ruling are not present in a given case, the Illinois Brick bar still applies. It is a bright line rule. You're either an indirect or you're a direct. And if you're indirect, no federal antitrust claims.

Now, Mr. Simon did make reference both today and in his brief that defendants can't cite a case where the courts denied the claims or barred the claims where the plaintiffs purchased from alleged cartel member. Well, I'd like to give you three. First, implicitly that's exactly what the Third Circuit was saying in In re Sugar. The Third Circuit said that Borden could defend its case by proving that the candy that it sold to the plaintiff incorporated sugar that was manufactured by a third party defendant. There would be the same case here, your Honor, where the plaintiffs have alleged that a television or monitor manufacturer who is a defendant in the case purchased a CRT upstream from a coconspirator. That is, by saying that Borden could raise this issue as a defense, along with defenses that it didn't participate in the conspiracy or that the

plaintiffs were not injured by the conspiracy, surely means that the Third Circuit anticipates that where plaintiffs purchased in this manner from a subsidiary of alleged cartel member that the plaintiffs' claims could be barred.

The Third Circuit made this further clear in the Midwest Paper case, 596 Fed. 2d. 573, I'll refer to pages 588 to 89. There the plaintiffs alleged that they had purchased paper products from the Continental Group, who is defendant, their subsidiary Great Plains. Midwest made the determination to sue the Continental Group, the parent entity, but not the subsidiary; and Third Circuit held that Midwest had no standing to sue because, quote, it did not purchase the bags directly from any of the defendants. They said you can sue Great Plains if it participated in the alleged conspiracy and make that allegation in your complaint or you could maintain your claim for Continental Group but only if, quote, as a consequence of the Continental's domination of the subsidiaries' prices were determined in accordance with the general price fixing conspiracy.

So there, again, the Third Circuit is saying that where you've purchased from family -- a related entity where one of their related entities allegedly participated in a cartel, the plaintiffs' indirect

claims may be barred.

Finally I'd refer you to Dickinson versus Microsoft, 309 Fed. 3d. 193, and I'll refer to pages 214 to 15 and this is a Fourth Circuit opinion. In Dickinson, plaintiffs alleged that Microsoft conspired with OEM computer manufacturers to maintain Microsoft's dominance in operating systems. The plaintiff purchased computers from defendant OEM's with the Microsoft software installed and claim that they paid too much.

The court held that even though the OEM's were alleged to be co-conspirators and affirmatively chose not to sue Microsoft, the plaintiffs' claims were still barred by Illinois Brick because it is a bright line test.

Now, incidentally, if plaintiffs want to say the same result applies in LCD that applies here, that's fine with me. My clients were dismissed from LCD.

THE COURT: Where is the cite in LCD? I can't find it in your indexes.

MR. SIMON: I've got it right here, your Honor. The one I was citing is the decision on the first motion to dismiss was 586 Fed Supp. 2d. 1109. And I was reading from page 1118.

THE COURT: Thank you.

MR. LITWIN: Now, on the corporate -- let me

read my notes here -- Mr. Simon said that the alleged conspiracy in this case was to maintain specific prices of finished products. That is nowhere in this complaint. If you look at paragraphs 139, paragraphs 144, paragraphs 146, you will not see any allegation that the defendants fixed the price of a finished product, TV monitor -- TV or monitor.

The only thing you will see is that the upstream alleged conspiracy considered pricing of downstream products which, of course, is natural in any alleged pricing decision that takes place upstream. You consider what your downstream customers are going to charge for things.

Mr. Simon also said that the tubes comprised 80 to 90 percent of the cost of a television or monitor and for that reason you can't separate one from the other. I saw paragraph 101 in his complaint. No percentage is given. That is outside the scope of the factual allegations in this case and, as a point of matter, dead wrong.

He cited the Knevelbaard case, but once again that's not an Illinois Brick case. That's an Associated General Contractors case, which is a completely different and separate issue from Illinois Brick.

Finally, Mr. Simon in his chart notes that

seven of the 12 groups of defendants are, although I hope he would concede were, also vertically integrated, but that does not mean that there was unanimity of corporate structure here. It is not the case that in each and every case for each and every of the defendant groups on this list that there was an upstream manufacturer of CRT's that's that owned the subsidiary that made televisions and monitors, that sold those CRT's to that controlled subsidiary who then sold those TV's and monitors to plaintiffs. That is the In re Sugar scenario. That is not the case here.

Here we're dealing with affiliates of holding companies, joint ventures. The facts are far more complicated and far more diverse than what was considered in the Royal Printing case, in the Illinois Brick case or in the Linerboard case.

That's all I have, your Honor.

THE COURT: All right. What next issue are we going to proceed to?

MR. YOHAI: We have AGC which I'll try to handle it more briefly since we've talked about that already.

MR. CORBITT: Are we still on the direct case?

MR. KESSLER: We're doing all of our direct arguments.

MR. YOHAI: Your Honor, David Yohai of Weil, Gotshal & Manges for defendants Panasonic.

THE COURT: Let me get my notes organized here.

MR. YOHAI: David Yohai for Panasonic, PNA and MTPD.

Your Honor, plaintiffs have the burden of establishing antitrust standing, and even if the court were to find Illinois Brick inapplicable, it is applicable, as co-counsel has indicated, they'd still have to prove separate independent standing under AGC.

We've heard already this morning, and I would refer your Honor back to paragraphs 11 through 23 that the complaint alleges the exact same thing for all 13 named plaintiffs, that they purchased CRT products. Now, Mr. Simon said a few minutes ago, oh, well, two of them purchased CRT's. Well, it doesn't say that in the complaint. It doesn't say which two. He actually said two -- I think he misspoke. He said two of them purchased finished products. That's really the problem. We don't know which ones purchased finished products versus CRT's.

But more importantly why are they doing this? Why are they playing games in the complaint by modulating between finished products and CRT's? They're doing this because they really want to be, in effect,

indirect purchasers. They really want to claim damages on behalf of indirect purchasers because that's what they are. They're retailers. They are not people who buy CRT's. No one would walk into one of their plaintiffs, Arch Electronics, like a Best Buy, no one walks into Best Buy and buys a CRT tube. It doesn't make any sense. They buy televisions. That's what their plaintiffs are, and that's really what they're trying to claim.

Well, what's the problem with that? The problem with that is under AGC you have to, as the first factor, establish antitrust injury. And that means they have to be a participant, plaintiffs do, in the same market. They have to purchase in the restrained market.

Well, if they purchased televisions, that is not the same market as purchasing CRT's. He says he understands, Mr. Simon does, how the television market works. He says, well, it's a conspiracy not only of CRT's, but of the television market.

Well, I would ask him this. Where is Sony in the complaint? Is he claiming that the television market, there was a conspiracy in television market, but Sony wasn't a participant? Where is Sharp? Is he claiming there was a television conspiracy, but Sharp wasn't a participant?

It doesn't make sense. Without those companies participating there could not be a television conspiracy, and the attempt that they make in the complaint to allege a television conspiracy falls flat on its face. They can't do it. It's out under Twombly, it's not specific enough and the reason is because it doesn't exist.

The indirects say that the television market -- that there was vigorous competition in the television market. That's exactly right. There is vigorous competition in the television market. So if they're purchasers of television, they're in the television market, not the CRT market, and that's their problem. So to fudge this they say it's a CRT product, and you've heard a lot about this already. I'm not going to repeat that. That's their main problem.

What else? LCD. This is the crux of their position. Look at the LCD case. Okay. Well, if you look hard at Judge Illston's decision, she says the issue is that the plaintiffs purchased from cartel members. That's the problem. They're cartel members. He calls them vertically integrated.

Okay. Well, what cartel are we talking about? There's no television cartel. Like I said, there's no Sony, there's no Sharp. It's a cartel of CRT's here, if

that's what they allege. That's not the market that most of their plaintiffs purchased from. So you need to carve out all of the plaintiffs who purchased TV's.

Maybe we're going to have a case about those who purchased CRT's, the tube itself. Maybe we could have a case about that. I doubt it. There aren't going to be enough to have a case, which is why they've sort of done this to avoid that problem because they don't really want to be here on behalf of actual CRT purchasers. That's their problem.

Now, if they were going to do a television market, what else would have to allege? They'd to have allege that market is oligopolistic. They don't. They'd have to allege how many defendants participate in the market for finished products, TV's. They don't. And they'd have to name all the competitors. They don't. That's a problem for them. It's a problem for them on multiple levels, and it's a problem for them on AGC.

Okay. What else? He said 80 percent. This goes to the issue of the injury and it's speculative. 80 percent of a TV cost is the CRT. That's not true. 60 percent is what the indirects allege. Actually, they allege less than that, less than 60 percent. So you've got other components, you've got speakers, you've got

other issues, and that makes sense because the price of the television isn't the same as price of CRT's. They are different markets, they are different products, you cannot gloss over these distinctions.

Also the complexity here. He takes a simple case of the vertically integrated company and he says, well, they make the tube, they put it in a television and they sell it to you. Not always. Sometimes they buy the tube from someone else. We buy -- Panasonic buys tubes from people, other companies buy tubes from other people.

So it's not a direct chain down from maker to seller. There are all these things in the chain. Sometimes when we purchase a CRT we would be a victim in his world if we bought a CRT. Clearly that's not the same case as a case where we made the CRT and put it in our television.

You can't gloss over these considerations. They should be forced to plead who bought CRT's and who bought finished products and what is this conspiracy and not to blend the two. I think if you force them to do that there's not going to be a television conspiracy. There isn't one. And when you're left with who bought CRT's, there's not enough people for that class.

So getting back to AGC. You've got problems

that they didn't purchase in the restrained market. That's the first and more important factor.

THE COURT: I'm sorry. I missed the last few words you said.

MR. YOHAI: Yes. Getting back to AGC is what I said. So getting back to AGC, you've got problems because antitrust injury is the first factor. They have to participate and purchase in a restrained market. They didn't if they bought televisions.

Two, it's speculative as to the nature of the injuries because the costs, as I mentioned, are not just the tube. There are many other costs.

Third, you've got this complexity problem of who purchased from who what. If we bought a CRT from someone else, it's different than if we made the CRT and put it in our own television.

And, finally, you've got an issue about duplicativeness. What are we going to do here? We've got them saying, oh, well, you should pay us if you win because you overcharged us. Well, the indirects are saying you should pay us if you win because you overcharged us. Where are the pass-on allegations if they're retailers here, which they all are? They purchased from somebody else. A subsidiary. So they're claiming we should pay them, the indirects are claiming

we should pay them.

Where are the pass-on allegations? That's their burden. When they are TV purchasers, they have to allege pass-on. They have to tell us how much were they overcharged because they were not the direct purchaser, they didn't just purchase the CRT, they purchased down the chain.

In sum, your Honor, they are trying to shoehorn this in. They are trying to say, well, let's just put it in one bucket. It doesn't matter. We'll figure it out later. And they're trying to say, well, Judge Illston said that was okay in LCD. To the extent her opinion could be read to say that, I would say she is wrong on that point; but more importantly, here, here where you've got a television conspiracy which they are alleging and you've got all these issues in terms of who was purchasing from whom, AGC comes out the other way, and I'll have more to say about on the indirect side.

In particular, we're going to talk about the DRAM decision when we go to the indirect side, which I think the most important and only careful analysis will show this. In the DRAM case 516 Fed. Supp. 2d. 1072, and there is further decision at 536 Fed. Supp. 2d. 1129.

MR. SIMON: Your Honor, I think you had the

gist of the arguments, so let me just talk about points that haven't been discussed already in hopes that we stay within our time limit of trying to get done today, which I think would be reasonable.

There is no duplication between the direct and indirect purchaser classes as defined. Let's just be clear about this. The class includes somebody who bought directly from a defendant a tube or directly from a defendant a finished product. They are the first person who buys within the vertically integrated chain of finished products. So he says why isn't Sony and why isn't Sharp in? Because Sony and Sharp may in fact buy tubes and may in fact be in the class because they bought directly.

THE COURT: I think he's also arguing how can you allege a conspiracy to fix prices like that with two major manufacturers out of the conspiracy. I think that's really part of what he's arguing.

MR. SIMON: In you look at paragraph 144 of the complaint, it exactly addresses that situation, your Honor, and let's just turn to it for a second because this is very important. We allege that they're fixing the price of tubes and because they're fixing the price of tubes, Sony and Sharp are getting a price which is the same as everybody else which is fixed. Therefore,

when they say that the finished product market would be competitive and wouldn't reflect the price of the tubes being fixed, that price fixed tube is going to be in Sony's and Sharp's TV's as well. They're going to have to pass on that cost when they sell it to the indirect purchasers, and that's the claim they're making. We're not making that claim.

So, yes, they can not be in this particular case and there still can be a conspiracy because the conspiracy was defined by the defendants as if we conspire at the tube level, we cannot only effectively fix the price at the tube level, but we can affect the price at the finished product level. And Sony and Sharp, to the extent they buy from them, they're affected like everybody else.

Look at 144 for a second where we spell that out, and it's a very important paragraph in the complaint. It's based on lots of detailed information that we have that isn't specifically in this complaint. And it's very much like the LCD situation. It says (As read):

> Based on this information, defendants agreed on price guidelines, either a range of price increases or a range of price floors known as bottom prices. The price guideline can serve

as a floor in declining markets or could serve as a basis for a price increases in rising market. Failure to object indicated assent.

And there's multiple paragraphs, as you know, in here about the meetings and who participated.

The agreements encompassed prices in United States dollars to specific third party customers and prices reflecting inclusion of specific features in a CRT, such as certain types of coding or the differing types of is shadow mask.

So specifically alleged, the fix was with respect to not only what they would charge through their vertically integrated companies, but also as to third parties, Sony or Sharp.

The agreements encompass not only prices charged to third party customers, but in the case of virtually integrated manufacturers who produce both CRT's and CRT products also encompassed, A, prices charged by the CRT manufacturing arm of such integrated company to the corporate division or subsidiary that manufactured or sold computer monitors, televisions or other similar products.

That's saying that when you're Samsung and you

have a company that also produces the monitors and televisions that that fixed price of that product is going to be translated 100 percent in the price you're going to charge for your finished product (As read):

> And, B, price floors on quotations offered by the competitors of the integrated company to such division or subsidiary. Defendants also considered the internal pricing of products containing CRT's in agreeing upon the prices at which CRT's were set.

That is about as detailed an allegation you will see in a complaint about how it worked and it answers multiple questions that are raised by counsel, not only the fact that why are Sharp or Sony not in, because they were fixing the price to third parties and they were fixing the price internally and it affected the price of the finished product.

It is alleged -- it's also alleged in paragraph 146. This is an allegation -- I won't read it -- about the fact they restricted production, your Honor, in order to keep the price of tubes up which would have an impact on the finished products. And they actually policed themselves by visiting each other's plants, as alleged in paragraph 146, an issue that's common to all purchasers. Defendants based these determinations of

what the market would look like after jointly analyzing anticipated supply and demand and they considered -- this is the allegation -- the analysis often included consideration of downstream prices for televisions, computer monitors or similar products and how they would affect the price ranges being collusively set.

THE COURT: Is that an allegation that really reads the prices, downstream prices for television, computer monitors, similar products were set?

MR. SIMON: Yes.

THE COURT: That's equivalent to an allegation of conspiracy to fix these prices.

MR. SIMON: That's an equivalent of an allegation just like in Linerboard and in Sugar --

THE COURT: I just wanted an answer. I got my answer.

MR. SIMON: A conspiracy that impacts the price of both finished products and it's done through the components. They are inseparable.

I would suggest, your Honor, that when you look at the AGC argument, you're going to come down to the basic issue of what are the allegations in the complaint. I will point out with respect to the direct purchaser claims, they only argue the nature of the plaintiffs' alleged injury, which is, one, the first AGC

factor, and the speculative nature, according to them, of the harm.

I would also point out that reviewing that standard you look at American Ad Management, Inc., which says plaintiffs do not have to establish each factor to have antitrust standing. It said courts balance these factors, giving great weight to the nature of the plaintiffs' alleged injury.

If you find the interrelationship that's alleged in that paragraph and other paragraphs in the complaint which says the fix was on CRT products, then there is nothing speculative about the injury and there is no question that we allege that it impacted both prices.

I would, you know, read for you, even though they are trying to distinguish Sugar in the worst possible way, but Sugar, taking a look at the situation where there's sugar and there's sugar-containing products, that is the equivalent of what would be a finished product here, Third Circuit said (As read):

> To deny recovery in this instance would leave a gaping hole in the administration of the antitrust laws. It would allow the price fixer of a basic commodity to escape the reach of a treble damage penalty simply by

incorporating the tainted element into another product. Illinois Brick did not purport to provide any such escape. The opinion was at pains to point out that overcharges collected by direct purchasers should be remedied.

I would also point out that going to the issue of what they were doing here in this kind of suggestion that we're playing games, we're talking about defendants who conspired overseas so they could try to immunize themselves from the antitrust laws in the United States. Accusing plaintiffs who represent the victims of this particular conduct where it's going to be undisputed that these meetings occurred, 500 of them, but they're accusing us of playing games when they're the ones who met offshore to try to run away from their liability in this case, and we respectfully request that you take that into consideration in weighing the AGC factors in taking our complaint and weighing it in a manner that we think the allegations suggest, your Honor. Thank you.

MR. YOHAI: Just very quickly, Mr. Simon says that Sony and Sharp aren't here because they also bought price fixed tubes. Well, there's no record on this, but the notion that Sony doesn't make tubes is, I think, very hard to believe. Of course, it makes tubes. Of course, Sharp makes tubes.

He also points us to paragraph 144, but the allegations in that paragraph say defendants also considered the internal pricing of products containing CRT's in agreeing upon the prices at which CRT's were set in that paragraph. It doesn't allege specifically anyway that they considered the television pricing at all points or with all competitors. So I think he's wrong there, too.

The issue about playing games I think really goes more to how they're pleading their complaint. The issue is this. If they're talking about televisions, they should be talking about televisions and computer monitors. If they're talking about CRT's, then talk about CRT's.

THE COURT: Can't they talk about both?

MR. YOHAI: No, I don't think they can.

THE COURT: You can't say we can prove a conspiracy to fix CRT prices and we can prove conspiracy to fix prices on finished products.

MR. YOHAI: Well, with respect to the finished products, your Honor, I don't think they're serious about the television conspiracy.

THE COURT: I'm not saying do they. I think that's the point. I think you're arguing they can't do it.

MR. YOHAI: A, I don't think they can. But, B, more importantly, they haven't. They haven't pled it sufficiently in their complaint. If they were really serious about a television conspiracy, they would have to allege specific allegations about the meetings concerning television pricing. All the meetings they're talking about were about CRT tube pricing. So when it's convenient to talk about tubes for the actual meetings they refer to, they talk about tubes. When they want to talk about televisions, because they'd rather have the damages from the televisions, they throw in televisions, but you can't blend them. It's either one or the other. That's the most important point here. I think your Honor knows that very well from what we argued. I'm not going to belabor it.

THE COURT: Wait a minute. They can't do both?

MR. YOHAI: I said I wasn't going to belabor it because I think your Honor has heard it very well this morning, all the arguments about why they can plead a CRT conspiracy, but at least based upon the facts pled here they haven't pled a television one.

MR. KESSLER: I think their argument is, your Honor, that they pled neither.

THE COURT: I was going beyond can. Would it

be possible for anybody ever to do that?

MR. SAVERI: Who's talking?

THE COURT: Wait a minute. I'll keep house.

MR. KESSLER: They could clearly, in our view, if they had specific facts plead a television conspiracy and a CRT conspiracy, but what they've done by conflating it is plead neither.

MR. SIMON: I'm honored I'm the first one to be double-teamed. I must have said something good.

THE COURT: I understand that argument. It's his use of the word couldn't, if there was something innate in this arrangement.

MR. SPECKS: What we've alleged is a single conspiracy which encompasses both CRT's and electronic devices incorporating CRT's, not two conspiracies.

THE COURT: All right. And we have another issue.

MR. YOHAI: Yes, the last one is statute of limitations.

MR. ROGER: Good morning, your Honor, Kent Roger, Morgan Lewis & Bockius on behalf of the --

THE COURT: Point of order.

MR. SAVERI: May I ask a question? We've heard various arguments by Mr. Kessler and other issues. Now have you people addressed the Twombly issue?

THE COURT: Well, they've mentioned it.

MR. KESSLER: We are addressing it as it applies to a specific allegation. As we've told you many times, we did not make a general Twombly argument. We made it in the context of specific facts.

MR. SAVERI: I just wanted to know.

THE COURT: Now, you're arguing statute of limitations.

MR. ROGER: Yes, your Honor. Kent Roger, Morgan Lewis of behalf of the Hitachi defendants, Hitachi Ltd., Hitachi Asia Ltd., Hitachi America Ltd., Hitachi Electronic Devices USA and Hitachi Displays.

The Clayton Act, of course, bars claims for injuries that occurred more than four years prior to the filing of the first complaint.

THE COURT: Which would be in this case?

MR. ROGER: November 26, 2003. Sales before that would be barred --

THE COURT: Okay.

MR. ROGER: -- under defendants' view that the plaintiffs have not pled with sufficient particularity as required fraudulent concealment. And, indeed, there is no dispute that Rule 9(b) requires that a party alleging fraud state with particularity the circumstances constituting the fraud or mistake. The

plaintiffs concede that standard.

And, thus, that standard for purposes of the statute of limitations is higher even than the Rule 8 and Twombly and Iqbal pleading standards that we have been discussing.

THE COURT: You think it's governed by Rule 9.

MR. ROGER: It's governed by Rule 9 and plaintiffs concede it's governed by Rule 9 in their opposition.

THE COURT: How many defendants are we concerned about on the fraudulent concealment issues?

MR. ROGER: Well, there are 48 individual defendants they have named, and it's defendants' position that the plaintiffs have not pled with the required specificity against any of them because unlike even in their conspiracy claims where they lump individual corporate families together, such as Hitachi or Samsung, quotes around them, in connection with the fraudulent concealment allegations, they have lumped all of the defendants together. And so none of the defendants knows which of the defendants supposedly affirmatively acted, and under the case that we cited both in our opening and reply briefs, Barker versus American Mobile Power in the Ninth Circuit, one cannot plead that acts by one defendant inure to the detriment

of other defendants when it comes to fraudulent concealment.

THE COURT: Okay. Now, what about the withdrawal. A few defendants have argued they withdrew from the conspiracy.

MR. ROGER: And Hitachi is one of them, and we will be discussing those and I think a handful of those will be discussed in connection with the individual motions. So I'm raising now the arguments with respect to fraudulent concealment that cut across all of the defendants.

THE COURT: You're not arguing withdrawal.

MR. ROGER: Correct, not in this portion of the argument your Honor. So we've established that 9(b) requires the particularity, and conclusory statements, of course, are not enough and we cited the Conmar case for that proposition. The plaintiffs have to plead the identity of the defendant who fraudulently concealed because, again, under Barker you can't attribute to the other defendants the supposed affirmative acts of one defendant.

They haven't alleged any acts of fraudulent concealment. They rely on general allegations, as I say, against defendants.

THE COURT: I want to be sure I got your first

point.

MR. ROGER: Yes, your Honor.

THE COURT: Being that to allege fraudulent concealment they've got to discuss each individual defendant.

MR. ROGER: Yes, your Honor, and that's the rule of Barker.

THE COURT: Okay. Second point?

MR. ROGER: It's also the facts on some of the cases on which they relied which I'll talk about in a second or two. But what they have done is to allege against all of defendants attendance at various glass meetings and instructions not to take minutes and participations in telephone conversations. They list all of these at pages 25 and 26 of their opposition.

But, one, they don't say who did those things; and, two, those things are exactly the same allegations as they plead in connection with the conspiracy. So they are not the separate acts of affirmative concealment that is required in order to toll the statute of limitations. They rely on the EW French & Sons case versus General Portland. That case I think is illustrative of the problems with their pleading because in that case the issue was whether or not the defendant involved, General Portland, did certain things such as

explicitly deny price fixing or use plain white envelopes to distribute pricing information.

Again, it was just General Portland, and the court appropriately found that the allegations that General Portland did those things were sufficient. Compare that to the allegations that they themselves summarize at pages 25 and 26. And, again, it's defendants this and defendants that, and no one knows who did what.

Likewise, the Conmar case cited by both the plaintiffs and defendants in which Mitsui, not a group of defendants lumped together, filed customs documents falsely reporting prices of the relevant conduct.

And, in fact, your Honor, if you take a look on page 25 of their opposition, if you're there, you look at the final bullet point, the thing that comes -- the allegation that comes closest to alleging an affirmative act of concealment is that final bullet point wherein they say when several CRT manufacturers, including defendants Samsung, Phillips and LG Electronics, increased the price of CRT products in 2004, the price hike was blamed on a shortage of glass shells used for manufacturing CRT monitors. In justifying this price increase, the price increase that's referred to in that prior sentence, a deputy general manager of an LG

Electronics distributor in India stated this shortage of glass shells is a global phenomenon and every company has to increase the prices of CRT monitors in due course of time.

So that bullet in the plaintiffs' opposition is instructive because, one, it shows that they know how to plead when they want to the required specificity of affirmative concealment, and yet in that one place where they do that, they don't plead it against the defendants generally. They don't even plead it against a defendant. It's only against a nondefendant distributor, unidentified, for LG Electronics. That's the best that they've got in terms of affirmative conduct.

Secondly, your Honor, the pleading itself discloses that the plaintiffs had constructive knowledge of their claims throughout the conspiracy period. They say in their opposition that what they were on notice of were only apparently market events, and they say that at their opposition on page 31, and yet their complaint is replete with statements that they then characterize in an original version of their complaint as fundamentally inconsistent with a competitive market, and that is the Arch Electronics case that was filed prior to this case being assigned as an MDL.

But what are the kinds of things that they allege at pages 24 and 25 as we summarize in 24 and 25 of our opening brief. They say that the CRT industry was oligopolistic in nature, it was conducive to collusion. There was consolidation, high cooperation, joint ventures, trade associations.

THE COURT: I'm sorry. Where are you reading from?

MR. ROGER: There's a list in pages 24 and 25 of our opening brief, your Honor, with the citations.

THE COURT: Your opening brief.

MR. ROGER: Of our opening brief where we list and cite --

THE COURT: 24-25.

MR. ROGER: Right.

THE COURT: Okay. This is all dealing with fraudulent concealment, not the --

MR. ROGER: This is dealing with whether or not the plaintiffs had constructive knowledge of the conspiracy during the time of the conspiracy. So I won't belabor that listing, but we have cited chapter and verse to the direct purchaser complaint with respect to those matters that we believe would have given the plaintiffs constructive knowledge of the conspiracy period.

Highlighting just briefly on page 25, your Honor, the bullet point that refers to paragraph 196 of the plaintiffs' complaint, that would be the bullet right before output production alleged to evidence collusion, but it says in their complaint (As read):

> Over the course of the conspiracy period, the prices of CRT's remained stable and in some instances went up in an unexplained manner despite the natural trend in most technology products to go down over time.

So what we have in the complaint is a litany of acts and observations and phenomena that they plead themselves and yet don't explain why that not be constructive knowledge of acts of conspiracy which should excite the reasonable mind to inquire, and that's the third point of our statute of limitations fraudulent concealment argument, your Honor, first being they haven't alleged affirmative conduct; secondly, they were on constructive notice of all the bad things that they were alleging in their complaint; and, third, having been on constructive notice, they do not plead the required due diligence, and that's the Rutledge case that we cited in our opening and closing brief.

What they do say at paragraph 203 is, well, we didn't do due diligence, but we didn't have to do due

diligence because the nature of the conspiracy was inherently self-concealing. But that's not good enough in the Ninth Circuit, and that's the Conmar case in which the plaintiffs also said that the nature of the conspiracy was inherently self concealing and the Ninth Circuit said, no, we require more.

And in the Rutledge case, the pleading was that the defendants have fraudulently concealed the existence of the aforesaid price discrimination through the adoption of elaborate schemes, resorting to secrecy to avoid detection and by denying that such discrimination existed, much like what the plaintiffs have done here. But the Ninth Circuit said you can't rely on conclusory statements. The plaintiffs have to plead with particularity the facts showing their due diligence in trying to uncover the facts.

So having conceded in their opposition that a plaintiff must plead facts alleging its due diligence, that is what did the plaintiffs do in response to facts that would excite the inquiry of a reasonable person, the plaintiffs just say there was nothing they could do because of the inherently self-concealing nature of the conspiracy. That doesn't work in the Ninth Circuit under Conmar.

THE COURT: What's the cite to Conmar?

MR. ROGER: One moment, your Honor. That's 858 F. 2d. 499, and we cite that beginning at pages 21 of our reply.

So in sum, your Honor, they haven't pled affirmative conduct both because they haven't identified which defendants did anything. Secondly, they haven't pled affirmative conduct because they haven't alleged with particularity under Rule 9, a higher standard than Rule 8, Twombly and Iqbal, exactly what was done by whom when and to whom.

Their complaint is replete with facts which they themselves have alleged that would have given them constructive notice of their claims, and they concede they haven't pled the due diligence, relying only on an allegation that it was inherently self-concealing, which does not meet the standard in the Ninth Circuit. As a result, we believe that their claims after November --

THE COURT: Before.

MR. ROGER: Yeah, before November 26th of 2003 are barred.

THE COURT: Thank you. Is there a reply?

MR. RUSHING: Your Honor, Geoffrey Rushing of Saveri & Saveri on behalf of the direct plaintiffs.

I would just point out a housekeeping matter. The way we decided the argument, we had Mr. Montague

slated to address many of the Twombly issues raised earlier. So he will speak after me, if that's acceptable.

THE COURT: I'll tell you what. Let me hold off on that. I will note that you have not had an opportunity to address Twombly and, I guess, Iqbal at the same time, but let me hear the rest first because the Twombly issue are part of a lot of substantive things that are being argued, what's the standard for pleading, how specific do you have to be to plead that particular issue. So it's being subsumed within the other discussion. If you want a discussion alone of Twombly and Iqbal, I think that's fine, but I'd like to get the rest of the arguments to see whether we really need that.

MR. RUSHING: Well, your Honor, we understood that they were going to be issue by issue and we understood that Twombly to be an issue.

THE COURT: It is an issue, but in their presentation it's been subsumed in their other challenge to your allegations.

MR. SAVERI: But in that connection, your Honor, when there were four specific issues in the joint brief that we had, we are proceeding as if -- as far as we're concerned that there is going to be an argument

overall on the Twombly issues, on what we're supposed to plead to get by Twombly and Iqbal, and we are prepared to argue that in detail because that's very important; and we thought that the defendants were going to do it, but they made it as part of various different arguments.

THE COURT: So I will give you the opportunity to do that, but I want to hear all the other arguments first to see where it's really necessary.

Go ahead, Mr. Rushing.

MR. RUSHING: Your Honor, I'm going to address the statute of limitations fraudulent concealment argument.

THE COURT: Will you agree with the operative date of the statute assuming there is no tolling?

MR. RUSHING: I believe so, your Honor. Your Honor, I didn't check the date, but I think that's correct.

As you've heard already today, your Honor, in general our position here is defendants -- they misread the complaint, they ignore important allegations and they ignore recent cases in this district that decided virtually identical issues, namely LCD, Rubber Chemicals, the SRAM case. In short, plaintiffs have alleged many affirmative acts of concealment under the various cases cited in our brief.

We have done so with appropriate level of specificity, and we don't have -- and we have adequately pled that we were not on notice of these claims; and, therefore, it is plain under Conmar and other cases that we're not required to plead any affirmative acts of diligence in order to adequately plead fraudulent concealment.

So first the complaint contains hundreds of acts, of affirmative acts of concealment. It alleges that virtually every meeting, at least those after June of 2000, contain what cases in this district and elsewhere cited in our brief have determined do constitute affirmative acts of concealment.

So in paragraphs 137 and 205, the plaintiffs allege that the location and the organization of the meetings themselves were orchestrated so as to maximize the secrecy and minimize the chance of detection. Prior to that time, the CDT products and the CPT products meetings were held back to back in the same location. It was determined that that was too suspicious and so they changed their procedures.

Participants were told not to take notes. That's paragraph 204. The defendants affirmatively took steps to reduce the number of attendees attending the meetings to again to increase the secrecy, to decrease

the likelihood of detection, and that, too, is an affirmative act of concealment, and that's paragraph 205 and also paragraph 154, which explains that the attendees attended on behalf entire corporate families so that each -- the representative from each member of the integrated group did not need to attend.

They agreed to keep meetings and agreements secret. That's paragraphs 138 and 204 and 201. They had discussions about how to evade antitrust laws and concealing the existence and nature of their competitive pricing discussions from nonconspirators. That's also paragraph 204.

And then in paragraph 148, as part of these meetings, the defendants would also agree on what to say about price changes or output restrictions to their customers in order to conceal their conspiracy. Often one co-conspirator was chosen to make the first price announcement with the others following on an agreed upon schedule.

And 153 has very similar allegations, 206 very similar. Again, defendants also agreed at glass meetings and bilateral meetings to give pretextural reasons for price increases and output reductions to their customers.

And the paragraph 126 detailing the indictment

also notes that the X charge works were actions of concealment.

Defendants' argument that these kinds of allegations do not constitute affirmative acts is incorrect. And, again, they ignore important recent cases in this district. I'll read to you from the TFT LCD case, 586 F. Supp. 2d. at 1119 to 20. (As read):

> The complaint also alleges that plaintiffs were unaware of their claims and discovered them as a result of investigations by the DOJ and other antitrust regulators in December 2006. In addition, the complaint alleges that defendants engaged in a secret conspiracy that did not give rise to facts that would put plaintiffs or the class on inquiry notice that there was a conspiracy to fix prices for TFT LCD's and that the defendants agreed not to publicly discuss the nature of the scheme and gave pretextual justifications for the inflated price of TFT LCD's in furtherance of the conspiracy. The plaintiffs allege that in this context they could not have discovered through the exercise of reasonable diligence the alleged conspiracy. The court finds that plaintiffs have sufficiently alleged

fraudulent concealment and that it would be inappropriate to dismiss any claims as time barred at this stage of the litigation.

So in that case, Rubber Chemicals also refers to secret meetings and agreement not to discuss publicly the nature of the scheme, defendants' actions that might evidence their action and pretextual justifications for the inflated prices, the same kinds of conduct we alleged that were discussed and put into action affirmatively at each and every meeting. So it's not correct to say that we haven't alleged any. We've alleged hundreds.

Now, in addition, we have -- the complaint alleges numerous accounts of affirmative statements about misleading statements about the reasons for pricing situations as well as plant closures. There is no question that these are -- constitute affirmative acts in the case law, and I don't think the defendants argue otherwise, but again at paragraphs -- well, in general, 210, 207, 209, 195, and 211, and those all have to do with pricing. The complaint also alleges that output restrictions were an integral part of the conspiracy and that at these meetings defendants would agree on what to say about price changes or output restriction to their customers in order to conceal their

conspiracy, and the complaint contains several allegations about plant closures and the reasons given therefor.

Thus, in paragraph 183, it reads as follows (As read):

> In December of 2004, MTPD closed its American subsidiary's operations in Horseheads, New York, citing price and market erosion. Panasonic announced that the closing was part of the company's global restructuring intuitives in the CRT business.

That's a quotation of Panasonic's announcement.

> The company further stated that in the future CRT's for the North American market will be supplied by other manufacturing locations in order to establish an optimum CRT manufacturing structure.

Paragraph 184 (As read): In July of 2005, LGPD ceased CRT production at its Durham, England facility, citing a shift in demand from Europe to Asia.

185 (As read):

> In December of 2005, MTPD announced that it would close its American subsidiary's operations in Ohio as well as operations in Germany by 2006, as LG Phillips, the company,

explained that it was shifting its CRT operations to Asian and Chinese markets.

So, again, these are alleged as pretexts and in statements designed to conceal the effects of their conspiracy of which again there is no question output restrictions were an integral part. So there is also allegations, as we explained in our brief, about the use of trade associations to conceal their conspiratorial --

THE COURT: Do you think you have to make allegations as to each defendant, as something each defendant did?

MR. RUSHING: The answer is no, your Honor. I was going to get to that. I can address it now. I was going to say his first argument --

THE COURT: Address it when you want. Go ahead.

MR. RUSHING: -- is that we haven't alleged these affirmative acts in sufficient detail, but I would say, I mean, we disagree. In particular, the allegations I just read about the closures of plants and several of the --

THE COURT: There is some individuality in those.

MR. RUSHING: Yeah, they do allege, even though the case law doesn't require it, those allegations do

allege who, what, when. In some cases, as I noted, they quote the precise language used by the identified defendant. So they're just wrong when they say there are not allegations, specific allegations in the complaint.

Secondly, I think the standard is not as they say. They are trying to argue that there is this absolutely rigid and strict standard of who, what, when and where and that's not the case. The standard is flexible. It requires enough particularity to allow the defendant to answer, and that is consistent with the standard again that was applied in the recent cases in this district in TFT LCD and by Judge Jenkins in Rubber Chemicals and in SRAM.

So we do allege them with sufficient particularity and we allege far more than is necessary. The cases are clear again that you only need a very few such allegations to meet the requirements and that it's -- I mean, you don't need a whole lot, and for the fundamental and sensible reason that in these kinds of situations the proof is largely in the hands of the defendants. It is unreasonable to expect the kind of detail that they're asking for when -- given the fact that the proof is in their hands.

As the court stated in Rubber Chemicals (As

read):

> As many courts have noted, in the antitrust conspiracy context it is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly when the proof relating to the extent the fraudulent concealment is alleged to be in the hands of the alleged conspirators.

With regard to the secrecy protocols that the defendants engaged at the meetings, I mean, this is particularly apt. First of all, given the number of meetings and time frames of the conspiracy, to allege the detail that they asked for, the complaint would be 500 pages long. And it's also unreasonable for us to know -- I mean, the facts that they claim that we should know as to those.

So, again, those claims, I think, are adequate under the language I read from LCD, also under the Rubber Chemicals decision, and in addition, the complaint does contain several allegations specific date, time and what was said.

Now, the question of acts attributable to each defendant, our answer about that is that it is not necessary, but we have done it. First, it is not

necessary. The defendants fail to cite a single case for the proposition that in a price fixing case, in a conspiracy case that that standard is the standard. They cite the milk case out of Minnesota, which is an antitrust case. It doesn't address the proposition or stand for the proposition.

Every other case, the Barker case, it's not a conspiracy case, it's not an antitrust case, and that makes sense. As the language from Beltz that we cited, your Honor, it is fundamental in a conspiracy that one member is responsible for the actions of another member. In fact, we have alleged it in the complaint, that there was a division of labor and coordination in connection with secrecy, in particular the pretextual reasons given for price increases, plant closures, et cetera.

So it just -- the rule they suggest makes no sense, and they haven't cited to the court a single case in the context of this case that so holds. And so what they are asking your Honor to do is to make new law on that subject.

As I said, that rule that they're asking your Honor to adopt is inconsistent with the fundamental nature of a conspiracy as well as inconsistent again with the notion that in situations where the proof is in the hands of the defendants you shouldn't resolve things

on a motion to dismiss. You should resolve them on a fuller factual record after the parties have had the chance to conduct some discovery.

As to the acts attributable to each defendant, again, we have alleged it. We have alleged what occurred at the meetings and we've alleged with regard to each defendant that they attended these meetings in the various degrees that they have alleged in the complaint.

In addition, the specific allegations about reasons given for price increases, et cetera, we name specific defendants in those allegations, similarly in the allegations relating to plant closures, specific defendants are identified.

Again, Barker is not an antitrust case and does not a rise in a situation where the acts of one party can be attributed to the act of another. That's a crucial distinction here. In none of the cases that they cite stand for that proposition.

I would add one more thing. This rule that they propose was not applied in the recent cases and in particular in Conmar which counsel made a point to cite. It is true that in Conmar the court focused on the representations of one defendant, Mitsui, but it is not true that Mitsui was the only defendant in that case.

At page 500, 858 F. 2d. 500, there were defendants Mitsui and Mitsui Bussan Kabushiki Kaisha, they were the importers. There was the defendant Shinko Wire Company that manufactured the product at issue, PC strand, and there was defendant VSL Corp that purchased the strand.

The court reversed the Conmar. The court reversed. Based on the affirmative conduct of Mitsui alone, the court reversed the judgment as to all of the defendants. So I don't say that it directly addresses the issue. I do say it contradicts what the defendants are telling the court.

And in our brief, again, your Honor at page 28 we cite in addition to the Beltz case some cases at 28 and 29 In re Strap Metal, the Rudel case and New York v. Hendrickson for the proposition that it is well settled that affirmative acts of one defendant co-conspirator undertaken during the course and in furtherance of a conspiracy are legally attributable to all co-defendant co-conspirators under principles of substantive conspiracy and joint and several liability.

So that's the law and that is also consistent with our allegations in the case that again they coordinated on these matters.

Finally, diligence. Conmar is clear that we do not need to allege affirmative acts of diligence if we

were not on notice of the action. The complaint adequately plainly alleges the same kinds of allegations accepted in the LCD case, in the Rubber Chemicals case that the plaintiffs were not aware of the cause of action until the Justice Department acted against the defendants. That's imminently plausible. It explains how and why the plaintiffs became aware of their cause of action, and that is more than need be alleged in these kinds of cases.

The complaint also alleges that plaintiffs were unaware of their cause of action before that time. That's an allegation as to their own mental state. I think that counsel's argument that we have to allege affirmative acts of not knowing about the conspiracy doesn't make any sense. If we are on notice, then there is an obligation to plead diligence, but that is -- but only if we are on notice of the cause of action.

And not only that, as Conmar makes clear, the complaint must show as a matter of law that plaintiffs are on notice and to suggest that things like -- that knowing that there was -- if a class member even had an idea before 2003 that there was an oligopoly amongst defendants or that there had been consolidation or that it was a mature industry that had already recouped its capital investments, as they suggest in their brief,

it's an absurd suggestion to say that that would put us on notice as a matter of law of our claims and thereby trigger a need to do due diligence. It just doesn't, and many cases cited in our brief so hold, and I'll point out just one of them to you, your Honor.

In the SRAM case, the plaintiffs relied heavily on the existence of a conspiracy in a similar product entered into by the similar -- excuse me -- in a similar product also manufactured by many of the same defendants and that was the DRAM case. And in DRAM there was a large litigation, as everyone in the room is aware, there were guilty pleas and indictments, et cetera. And the plaintiffs argued that because there had been a conspiracy in DRAM, which was a very similar product, involved many of the same people as SRAM, it was reasonable to infer the existence of the conspiracy from the other conspiracy.

The defendants in SRAM argued, well, then, of course, if that's the case, if that's the case, then you must have been on notice of your claim in SRAM when you found out about DRAM, and Judge Illston said no, while the existence of the other conspiracy may support and does support her eventual finding that plaintiffs had stated a claim in that case under Twombly, it was not sufficient as a matter of law certainly to put the

plaintiffs on notice of their claim and thereby require or trigger a pleading of due diligence.

And that is 580 F. Supp. 2d. At 90405. And the SRAM complaint also contained allegations of market concentration and trade association, attendance, et cetera, as did the complaints certainly in LCD as well.

So, your Honor, I think that's all I have to say in response to the arguments.

THE COURT: Rebuttal.

MR. ROGER: Just very briefly, your Honor. Your Honor, in terms of the affirmative acts, what we're talking about here is coverup, distinguishing the facts alleged in connection with the conspiracy itself on the one hand and the defendants' attempt to affirmatively conceal that conspiracy such that the statute of limitations which otherwise would be ticking should be tolled. And in the number of references that counsel made to supposed acts of affirmative concealment, in fact, what they are are the conspiracy itself.

THE COURT: There can be some identity of those things.

MR. ROGER: I'm sorry, your Honor?

THE COURT: There can be some identity. If I say, Let's you and I go out on the alley and fix the price of paper used in antitrust cases, we can do that

and we can say to one another at the same time, now, let's keep this secret by not keeping any minutes of what we've done and going back and not telling anybody about it which is between the two of us.

MR. ROGER: But the importance of distinguishing between fact of the conspiracy and coverup is that were it otherwise, then there would be no statute of limitations. It would always be tolled because if the defendants didn't go out there and publicize that they were conspiring then someone would say, well, you're obviously concealing the thing, so my statute of limitations doesn't begin to run.

THE COURT: You can't put every act in one column or the other. Some belong in both columns.

MR. ROGER: And so the question that we ask your Honor to decide is whether or not the complaint sufficiently does that.

THE COURT: That's the issue.

MR. ROGER: The plaintiffs themselves distinguish between those contemporaneous actions that were part and parcel of the conspiracy on the one hand and pretexts to cover it up.

I notice that counsel did not speak to the apparent LG distributor, who actually is alleged to have made a pretextual coverup kind of statement in 209. So

that goes unanswered. But in the vein of coverup, what counsel did cite to are a number of allegations, I think beginning at paragraphs 183 and following, which again interestingly are under a heading on page 40 of their complaint of effects of defendants' antitrust violations, examples of reductions in manufacturing capacity by defendants.

So, again, those aren't pretextual coverup kinds of affirmative conduct that the plaintiffs were alleging in this part of the complaint. They were saying there was a conspiracy and look what happened as a result of the conspiracy.

I think it's for that reason that although they do cite a number of instances in which certain defendants, again without tarring all of the defendants with a particular brush with respect to an MTPD closing, right, what they say is this party closed, that party closed, this party closed citing a shift in demand, saying this or saying that.

With respect to those particular allegations, they don't allege that the reason given by the particular defendant for the closure was false. So, again, the distinction between the conspiracy and the effect of the conspiracy on the one hand, the plaintiffs agreed to close and they closed -- I mean, the

defendants agreed to close and they closed, on the one hand, and a defendant announcing here's the reason, but you know what, that reason was false and it was an attempt to conceal the conspiracy. It was an attempt at a coverup. That the plaintiffs haven't done.

But, moreover, they really have not answered the question about Barker, and so in respect of, say, 182 and 183 and 184 and 185 where they name four or five out of 48 defendants, they don't meet the point that we have 48 defendants and why should the statements, even if they are ultimately decided by the court to be sufficient, inure to the prejudice of the other defendants.

Well, what they're saying is, well, Barker isn't an antitrust case and it kind of stands to reason because in antitrust cases you've got the rule of joint and several liability and the conspirators are bound by the acts of their co-conspirators. But wait a minute. Wait a minute. We've a Rule 9(b) pleading standard here which is pleading fraud with particularity.

What counsel is telling you is that there is an antitrust rule which ought to be less stringent and shouldn't even be as stringent as the Rule 8, Twombly, Iqbal and Kendall say it needs to be in that context where you need to plead who said what to whom and when.

THE COURT: Has Twombly and Iqbal totally tossed out the usual conspiracy shibboleths that most have us grown up with that if there is a conspiracy, the act of one conspirator binds everybody?

MR. ROGER: Not at all, your Honor. What Twombly and Iqbal and Kendall in the Ninth Circuit say is that you need to plead the facts of who did what to whom and each defendant's role in the conspiracy. That's under Rule 8.

Under Rule 9, you have a heightened standard for pleading fraudulent concealment. And so the plaintiffs here are saying, well, we can rely on the lessons of Twombly and Iqbal and Rule 8 to say that they essentially gut Rule 9, and clearly, clearly Iqbal and Twombly don't do that. If anything, what they say is that you need to show -- you need to have a greater specificity of fact pleading even under Rule 8. And clearly if it doesn't pass muster under Rule 8, it certainly doesn't pass muster under Rule 9; and that's why the Barker case, we believe, actually is good law in connection with pleading fraudulent concealment under Rule 9, and the fact that one defendant fraudulently concealed is not to be visited on the other defendants unless there is an allegation showing what that defendant -- what those other defendants did.

And, again, the plaintiffs here don't even lump the corporate families together, the Hitachis and the Samsungs. They just paint broad brush and say all of the defendants, and we contend that that's just not good enough.

MR. RUSHING: Your Honor, may I have another minute?

THE COURT: No, we're going on too long here.

MR. ROGER: Finally, with respect to the constructive notice due diligence again, plaintiffs' counsel says, well, geez, we weren't really on constructive notice. I would ask the court to look at the laundry list of phenomena that they cite in their own complaint as to facts that were fundamentally inconsistent with a competitive market, to and including that over the course of the conspiracy period, over the course of the conspiracy period prices remained stable and in some instances went up in an unexplained manner. And their obligation is that when a duty of reasonable inquiry by a reasonable mind has been excited that they then have to plead what they did in order to uncover that. They concede they haven't pleaded it at all. Thank you, your Honor.

THE COURT: Now, that will be the end of the arguments on the direct cases with the exception of

perhaps returning to a more general discussion of Twombly and Iqbal at a later time.

Let us take a short luncheon break, if you want to call it lunch, 1:00 o'clock.

I'm not criticizing but overall I think the arguments have been a bit too long. I think you can make your points short and terse and simple. You can perhaps tell I read the briefs and I have now been educated by listening to the direct case. So perhaps the argument on the indirect can be a bit shorter. I'm not telling you how to argue your case, but I think you can make the shorter. Okay? 1:00 o'clock resumption please.

(Recess taken.)

THE COURT: Is there anybody who has not signed our signup sheet? I'm going to send the court reporter the final roster and I'd appreciate having a copy of this when you have time to make one.

All right. Argument in the indirect cases, who is going to be?

MR. KESSLER: I'll do subject jurisdiction first, your Honor.

THE COURT: Counsel, whenever you're ready.

MR. KESSLER: Your Honor, I'm going to address the issue of subject matter jurisdiction under the

indirect complaint and what I would start off by saying is that these concepts of the FTAIA apply not just to the federal cause of action, which is an indirect complaint, we have one federal cause of action under Section 16 of the Clayton Act which is seeking injunctive relief under the Sherman Act. There is no question that the FTAIA applies to that federal claim, but it also applies to the Commerce Clause, the Supremacy Clause and state harmonization laws to the state claims, and specifically I'll address each of those three different ways in which it applies.

It applies to the Commerce Clause because of the clear need for national uniformity in foreign commerce and issues of foreign relations and comity of this nature. Ironically, one of the leading case on this is the Supreme Court baseball case Flood versus Kuhn which dealt with even though we allow state antitrust laws, they are not completely preemptive. We don't argue that. Even though we allow them in general, we don't allow them to apply where they are going to conflict with a federal need for uniformity, and in the baseball case they ruled out to strike down all the state antitrust laws to baseball because since there was a federal exemption for baseball, they said there had to be one standard.

Similarly in the case of foreign scope of jurisdiction, when Congress has now ruled that the U.S. antitrust laws will not apply to foreign sales, foreign price fixing, foreign conduct that doesn't have the requisite effects in the United States, that same need for one uniform national policy compels the conclusion that the state laws cannot apply there either. They are, in effect, displaced by the Commerce Clause.

The leading case on this, your Honor, once again the one case I asked you to read is the 2007 Intel case, deals directly with this, and that Intel decision states that both the Commerce Clause and the Supremacy Clause have a combined effect of displacing any state antitrust laws to apply to overseas foreign anticompetitive conduct.

The way in which the Supremacy Clause applies is even though there is not what we call complete preemption by the federal antitrust laws, we know that from the Arco case state antitrust laws can exist. There is not complete preemption. There is still a preemption when there is a conflict between state and federal law, and Intel talks about this as well, and also the Crosby case in Supreme Court that we cited in our brief talks about this idea -- that's Crosby in the Supreme Court talks about the idea that when there is a

conflict between federal and state law in an area where the federal government has to have priority, then there is preemption there as well that to limited degree.

So to be clear, we're not arguing that the state laws don't apply to domestic effects CRT price fixing claims. We're arguing that just like the federal claims can't apply to overseas conduct, the state claims cannot either and again Intel is the case most closely on point.

Finally, we demonstrate in our brief, and I will not repeat it here in light of the time, but each of the state antitrust laws they cited, I believe it's 17 states, have a harmonization rule either by statute which says that the state laws can be construed in conformity with the federal antitrust laws or by judicial decision; and each of those states provide therefore further support for the notion that if the federal antitrust laws can't apply, the state antitrust laws can't apply.

Further, also cited in our brief are the consumer protection laws because some of the state laws that they asserted here are not antitrust laws, they are consumer protection laws or consumer fraud laws, laws of that nature. There again the Intel case is the best analysis of this.

There are harmonization rules in those states between what they call their little FTC acts, their state consumer protection laws and the Federal Trade Commission Act, the big FTC act. And the Federal Trade Commission Act has the same limitation not to apply to foreign sales, foreign price fixing, as the Sherman Act does. So when you are going to conform the consumer protection laws of the states, you come up in exactly the same place as the federal statute.

So my basic point here is that the standards are exactly the same for the state laws claims as they are for the federal law claims.

Now, what I'd like to devote the rest of my argument to is to demonstrate that the indirect complaint actually if it is possible presents an even more compelling case for lack of subject matter jurisdiction than does the direct purchaser complaint, and the reason for that is twofold.

First of all, there can be no question at all in the indirect complaint that they do not allege a price fixing conspiracy with regard to finished products. Quite the opposite. The indirect purchasers make it clear in many, many paragraphs that they are alleging a price fixing involving CRT's which was then passed on, and they have many paragraphs to make that

clear, but I would start with paragraph 227, and this is virtually dispositive on this issue, 227 of the indirect purchaser complaint reads as follows (As read): Computer and TV OEM's and retailers of CRT products are all subject to vigorous price competition whether selling CRTV's or computer monitors.

So this is the exact opposite of a conspiracy allegation in the finished products market. This is an allegation that there is vigorous price competition in that market. This is the market that that is Sony, that has Sharp, that has Sanyo, that has Vizio, that has HP, that has Dell. This market clearly the indirects are saying is subject to vigorous price competition, and that alone means they cannot allege a finished products conspiracy.

If there was any doubt about this, though, we could see this equally clearly from some of the other allegations that they make, and in particular their allegations about pass-on. If you take a look -- for example, they're pretty clear about this. On paragraph 237, what they say is the purpose of the defendants' conspiratorial conduct was to fix, raise, maintain and stabilize the price of CRT's. Not CRT products. What they then argue in conclusory fashion is, and, as a direct and foreseeable result, CRT products.

So they make it very, very clear, very clear that they are distinguishing between the alleged agreement to set prices for CRT's. You asked a question at the end of the direct purchaser plaintiffs, is this your allegation of the conspiracy to fix finished products prices, but I think the response you got was yes, even though there was nothing in the direct purchaser paragraph to say that, there was nothing. I heard the argument, but there was nothing there to say that in paragraph 144.

But having said that, the indirects are even more candid about that issue. So there could be no doubt about that, that this is a CRT conspiracy which they're just alleging has an effect, has an effect on the finished products. And for that issue, your Honor, I am going to -- and I'll get to this now, we are back to the Intel case that we discussed again where the mere fact that components had fixed overseas prices are not going to give them a claim because the televisions that came in or the monitors that came in contained those components. It just doesn't work on the subject matter jurisdiction principles.

Now, the indirects are also very clear the conspiracy they're talking about involves foreign sales. Take a look, for example, in paragraphs 203 of the

indirect complaint all the way really to 221. And what you will see is all of these claims are going to be first about CRT's, not CRT products, okay, and second of all, they relate to foreign CRT sales.

So to give you an example, in 204, it says on November 8, 2007, antitrust authorities in Europe, Japan and South Korea raided the offices of manufacturers of CRT's, not CRT products, with respect to that.

Similarly, I would call your attention to paragraph 208 which incorporates by reference a report in the Kyoto news. And, again, they say they don't want to be bound by the government investigations, they don't want to be bound by what they quote. They chose to incorporate these claims in their complaint; and, therefore, it defines their allegations.

What is it the Kyoto news say (As read):

> Officials of these three companies are believed to have at least ten meetings since 2005 in major Asian cities to coordinate target prices when delivering their products to TV manufacturers in Japan and South Korea.

That's what's wrong with their complaint jurisdictionally. That's what's wrong. The complaint is dependent entirely -- whenever it is specific, it is specific only with respect to foreign meetings involving

the foreign sale and fixing of CRT products to foreign TV manufacturers. When it is general, conclusory, then it throws into the United States or it throws in all CRT products together.

We were talking about the meaning of Iqbal in terms of this and what the Ninth Circuit said in the Kidd case. I managed to pick up a copy of the Kidd case since they raised.

THE COURT: Do you have a cite?

MR. KESSLER: Actually, my cite is a WestLaw site if you prefer that.

THE COURT: No, that's all right.

MR. KESSLER: But this came out on September 4, 2009. And in the Kidd case what they go on to say is they -- first of all, they specifically state, they specifically state that Iqbal now increases and heightens the pleading standard, doesn't reduce it. That's unequivocal. But the reason they didn't dismiss in that case is because they found, and I'm reading from page 22 of the citation, it says (As read): Here, unlike Iqbal's allegations, Al-Kidd's complaint plausibly suggests unlawful conduct and does more than contain bare allegations of an impermissible policy.

And then it goes on for one, two, three, four pages detailing very specific factual evidentiary

allegations made as to why this complaint survived as opposed to the Iqbal complaint. So this doesn't indicate that you don't have to plead this.

What I would suggest what Iqbal has to mean is the following. You take the complaint and you eliminate all the conclusory assertions and then you say what's left. And if you do that to the indirect complaint, the same if you did it to the direct complaint, if you eliminate the conclusory assertions and say where are the evidentiary facts pled, there is no way that you can find either, either any conspiracy about finished television products or monitors or any U.S. conspiracy of CRT's.

They may in fact have pled, and we're not challenging that they've pled a foreign conspiracy involving CRT's. We're not challenging that. But there's no jurisdiction over those claims. But they in fact have -- we do not challenge that they pled a foreign conspiracy involving CRT's, and that's the glass meetings and the top meetings and the working meetings and all that they say about that in general, but that does not give them subject matter jurisdiction with respect to the United States on that.

I'd also then ask you to take a look in terms of their specific claims on paragraph 222 on. Again,

this makes it clear -- this make it clear that they're claiming an indirect effect, and take a look at 223. This is, I think, the clearest statement they have. (As read):

> The defendants identified above that attended the glass meetings monitored the prices of televisions and computer monitors sold in the U.S. and elsewhere on a regular basis.

Note, there is no agreements. They just say they monitored what those prices were. Very, very different from an agreement.

It says (As read):

> The purpose and effect of investigating such retail market data was at least threefold. First, it permitted defendants such as Chunghwa, which did not manufacture CRT televisions or computer monitors the way that Samsung, LG, Daiwa, Panasonic, Toshiba, Phillips and Hitachi did, to police the agreement to make sure that interdependent CRT sales were kept at super competitive levels. That only has to do with fixing the prices of CRT's. They're saying by looking at end product prices it helps us monitor the CRT conspiracy, not fix prices

of finished products. (As read):

And, secondly, it permitted all defendants to police their price fixing agreements to independent OEM's who would reduce prices for finished goods if there was a corresponding reduction in CRT prices.

What does that mean? It says you're going to police the sales of prices of CRT's to independent OEM's. It doesn't say there's any agreement to fix the price of the finished product. So their second reason is all about CRT price fixing. (As read):

Finally, as discussed above, defendants used the prices of finished products to analyze whether they could increase prices or should agree to a bottom price instead.

That's of CRT's. Every one of the reasons they cite for looking at finished products, every one is all about having a CRT price fixing conspiracy. There is no question about that.

And then on 224, they go (As read):

The indirect purchaser consumers buyers CRT products from either a computer or TV OEM such as Dell or Sharp or resellers such as Best Buy.

Well, that just hammers home what they're talking about here are people who are claiming effects

as a result of buying finished products from retailers like Best Buy or a company like Sharp, who they say is not part of the conspiracy, okay, and claiming that effect comes from the overseas price fixing of CRS's.

And what I would say, that is inherently indirect, not a direct fact. And what the FTAIA requires is a direct, substantial, reasonably foreseeable effect. So there is no way for them to do this. What they would have to show, again like the directs, one allegation of saying this is a meeting these defendants went to and they fixed the prices of CRT's in the United States. Or they fixed the prices of televisions in the United States.

There is no such allegation. And what I would suggest, your Honor, is rather than asking them, well, is this allegation which doesn't really say anything about television price fixing or doesn't say anything about the United States, is this your allegation of proof, I think what you should be doing is saying, no, you have to plead this.

Now, if you can plead it under Rule 11, then the appropriate thing is to do is dismiss and let them replead. If they can't plead it under Rule 11, then they can't by oral argument convert plain words of the English language that don't say what they're claiming it

says and argue that somehow these allegations are sufficient.

They have the same problem as the directs do with CRT products. It's a little bit like arguing that there are three different things. Let's say you were dealing with three different fruits, apples, oranges and pears, and I'll define it as the fruit products. Now, I have allegations that pears are being price fixed but not apples and oranges. So I put an allegation that's saying fruit products are being fixed, including all three. So even if I have only allegations of one, I'm now arguing to the court that covers all three. It doesn't. That's the point. It doesn't. It doesn't cover any of them unless they specify which one it is.

That's the teaching, we believe, of Iqbal and Twombly in this context. It has to be defendant by defendant and it has to be product by product because they're not in the same product market. Televisions compete, by the way, not just against CRT television, but against plasma televisions, against LCD televisions, against many televisions. If you have a price fixing conspiracy in that market, you'd have to look at all products and competitors in that market. CRT's are in a totally separately market. That's why they can't just lump them together this way from that standpoint.

I'd also say, your Honor, the directs gave you a chart, and the indirects do the same thing --

MR. SIMON: Could I raise a point of order? I mean, this is supposed to be the indirect argument. It's the fourth argument made against the directs. We have no chance to respond. We're going to go for three days at this rate.

THE COURT: There was a reference to it, but I don't think it's that far.

MR. KESSLER: I'll limit it to the indirects. You can't come up with a chart and say, oh, these are vertically integrated companies, therefore they're all the same.

THE COURT: Now, you are arguing against him.

MR. KESSLER: No, but indirects do the same thing. They don't have a chart, but they have the same thing in their complaint. The point I'm making here, your Honor, is to look at the indirect complaint for this is that each of the groups are different. Panasonic, for example, MTPD, happens to be my client, they say, well, you're integrated. Says, well, the company that made CRT's during the statute of limitations period was a joint venture of two companies. It wasn't integrated. There were two different owners to the company. There are other companies like LPDD who

they're saying is part of the LG group. It was completely independent of LG for most of this period.

So, again, there has to be allegations in the complaint, factual evidentiary allegations. They just can't come up and tell to your Honor well, they're all in one group or say to your Honor that, well, each defendant represented each one.

They do allege that says every single group represented everyone in the group. That doesn't stand up under Iqbal. They have to have a fact to show that. They can't just make conclusory assertions to avoid their pleading burdens.

Almost done. Again, when you look at paragraphs in the complaint, you will see this is all about foreign allegations. All right. My last point. My last point again, your Honor, is that even if you were to conclude there was one allegation, two allegations, or they could replead about a price fixing agreement of CRT's in the United States or televisions in the United States, your Honor should make it clear, absolutely clear under the rubber products case that under no circumstances can all these claims in the complaint about foreign CRT sales or foreign CRT price fixing be actionable under United States law.

So again the FTAIA is a statute that requires

each of the claims to be analyzed separately, and if they have not stated a sufficient claim under Iqbal and Twombly, then jurisdictions should be dismissed.

And one final, final, I know I said final twice already. Continental Ore your Honor raised.

MR. SIMON: I raised it. He's responding to me again.

MR. KESSLER: Your Honor -- I won't mentioned Continental Ore. Your Honor raised a question that what about the old rule in conspiracy law that each company is liable for the acts of the co-conspirators if it's in furtherance of the complaint. That's good law. Twombly and Iqbal doesn't change that, but there's a predicate to that rule. The predicate to that rule is there first has to be independent evidence to establish that you are a participant in the conspiracy. Then if you are proven to be a participant in the conspiracy, then the acts of your co-conspirators within this scope will bind you.

What the pleading equivalent is is that you have to independently plead under Iqbal defendant by defendant what are the acts that constitute your participation in the conspiracy or what are the acts that show you are in a television price fixing conspiracy as opposed to a CRT price fixing conspiracy.

That's what has to be done independently under

Iqbal, and there is nothing contrary, in fact, with respect to the decision in LCD, LCD, I would make two comments about in that regard.

One is that decision was pre-Iqbal. Second, that decision states in the first LCD opinion it has to be defendant by defendant. Now, in the second opinion it found that that specific complaint was sufficient. But that's that complaint. This is this complaint, and what your Honor has to do is look at the factual allegations here because an application of Twombly is not precedential. In other words, the fact that within complaint is good or bad doesn't mean the next complaint is good or bad. It depends on the specific factual allegations.

So you can easily find that the plaintiffs here have not met their burdens of proving these facts -- not proving -- of asserting these facts with sufficient particularity to meet the Twombly pleading standard without in any way departing from the rule in LCD. This is a separate case that stands on its own.

So, your Honor, again, I would conclude by saying we think that the entire case should be dismissed for lack of subject jurisdiction even more so than the direct purchaser complaint, if that's possible, because they are completely candid in saying there's vigorous

price competition in the finished products market. So they can't allege a conspiracy that's plausible in that market. Thank you, your Honor.

THE COURT: Indirect plaintiffs, please.

MR. CORBITT: Thank you, your Honor. Craig Corbitt, Zelle Hoffman for the indirect plaintiffs. I think we heard a lot of heat there but not a lot of light. So let me see if I can put this argument into context of what we actually allege and what we actually need to prove.

First of all, since these cases have been mentioned quite a bit, not only this morning, but just now by counsel about what needs to be alleged sufficiently under Iqbal and Twombly, I'd like to just quote briefly from those decisions and what they actually say instead of relying on defendants' wish of what they might say.

What Iqbal actually does say -- and recall that this was a case about a Muslim --

THE COURT: I know what it's about. I read the case.

MR. CORBITT: Obviously not an antitrust case. Here's what it says (As read): The pleading standard does not require detailed factual allegations. It demands more than an unadorned the defendant unlawfully

harmed me accusation.

THE COURT: Where are you reading from?

MR. CORBITT: I'm reading from Iqbal case, 129 Supreme Court at page 1949. I don't have the U.S. cite.

And the same page (As read):

> Nor does the complaint suffice if it tenders naked assertions devoid of further factual enhancement. The claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The probability standard is not akin --

MR. SCARBOROUGH: Plausibility.

MR. CORBITT: (As read):

> The plausibility standard is not akin to a probability requirement but asks for more than a sheer possibility that defendants have acted unlawfully.

Similarly in Twombly, which was, of course, the predecessor case, and here I'm quoting from 127 Supreme Court at page 1965, the court said (As read):

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleadings stage. It simply

calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of these facts is improbable and that a recovery is very remote and unlikely.

So that's what these cases actually say, your Honor, and in that context I would submit that I doubt there have been many complaints in the history of private antitrust litigation, either of these complaints, that were as detailed and alleged as much with specificity, 500 meetings and various things that the defendants actually did at these meetings and agreements that they reached.

I am not personally aware of any of them, and I've been practicing for a long time, the only one that maybe comes close is LCD's, but there's even more meetings and more explosive facts in this case than there were alleged in that case.

Now, it's also important to note, and I know your Honor has in mind that these are state law claims we're dealing with on damages. So discussions about Illinois Brick and discussions about, you know, other federal law and federal cases, Illinois Brick really has

no application to what we're doing here, and even under the FTAIA, the only case that I am aware of that has expressly applied the FTAIA to state laws is the Intel case that counsel says is the one case you should read, and, of course, I'm happy to have you do that. I'm actually co-lead counsel along with Mr. Saveri and some other people in that case, so I know a bit about it.

Counsel, I'm sure, misspoke when he said that the Intel case said that you can't -- or stands for the proposition that you can't make a claim about a price fixed component being incorporated in an overseas product or in an overseas conspiracy. That's not what that case is about at all.

Intel was a monopolization case. AMD is Intel's principal competitor, to the extent that it has any, and the allegation that AMD made and that the class parroted, for lack of a better word, in its complaint was that Intel, as a result of conduct against companies in Japan and elsewhere in Asia foreclosed AMD from portions of the market and, in turn, that that caused injury and damages to AMD.

There were two Intel opinions. In the first opinion the court said AMD cannot base liability on something that occurred in Japan as a basis for saying that it lost profits on sales that it made or was

damaged generally in its business.

As for the class, in the subsequent opinion, the court said, and it's expressly relying on that, that it's too attenuated to say that the fact that Intel may have harmed AMD based on conduct that occurred in Japan or in some other foreign country in turn caused Intel -- resulted in Intel to have increased monopoly power which in turn meant that Intel sold chips or more to companies in the United States, such as Dell and HP, which then incorporated them into products which the class members purchased.

Obviously we disagree with that decision, but that is a very different circumstance than a direct price fixing conspiracy that occurred partially in foreign countries and partially in this country, which I'll get to in a minute, which had the purpose and effect and the defendants all understood was going to have the effect and did have the effect of increasing the prices of products sold in the United States.

Now, the plaintiffs allege -- and I just will stick to the indirect complaint. Obviously there is something of a straw man argument being made here, and I understand why they wanted to push this point so hard in the direct case because the circumstances are perhaps a little different.

We are indirect purchasers. So to say, yeah, we're alleging an indirect effect, of course. Everything we're alleging is an indirect effect because we are indirect purchasers. There is no doubt about that. But we are not saying that in order for our claim to survive and in order for us to recover damages in the United States that it is necessary that we establish either a separate or a combined conspiracy that includes both panels and products.

We have alleged that, yes, because the facts show based on what we know that is true and that the defendants in this case in their -- in their meetings that they had, in their 500 meetings, especially at the CEO level, were very concerned about and wanted to know what was going to happen to the prices of products sold in the United States because in order for the conspiracy to make any sense and to be effective, those product prices were going to have to go up. The cathode ray tube is just a paper weight and doesn't have any use unless it's incorporated in something like a television or a monitor. So they clearly agreed on that.

Now, we have not just, though, relied on allegations of meetings that occurred in Taiwan or Seoul or Tokyo or wherever they happen to occur. We have made direct allegations of conduct that occurred in the

United States. Of course, in saying that we've done no more than say exactly what the Justice Department says, which is actions in furtherance of the conspiracy were carried out in the Northern District of California.

But beyond that, just in the LCD case where Judge Illston said, and I'd like to quote 599 F. Supp. 2d. 1504, she relies on the fact that -- she says, quote (As read):

> Defendants complain that the complaints still do not differentiate between related corporate entities. As described in the complaint, the alleged conspiracy was organized at the highest level of defendant organizations and carried out by both executives and subordinate employees. The complaints allege that the conspiracy was implemented by subsidiaries and distributors within a corporate family and that individual participants entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families.

Now, we have the same allegations here in paragraphs 188 of our complaint, 113, 112. And why is that important? It's because we further allege that and have sued a number of defendants who are located in the

United States, subsidiaries of LG, Phillips, Samsung, Toshiba, Panasonic, Hitachi, Tatung, et cetera, I guess it's Mr. Simon's chart basically, and these entities have all been named. And during the class period, we allege and we believe to be true that all of these U.S. based defendants manufactured, marketed, sold and distributed both CRT's and CRT finished products to customers in the United States. And that's in the charging paragraphs 51, 55, 63, 65.

Actually, in the interest of time, I'll just refer your Honor to pages 94 and 95 of our opposition brief where this is laid out in much more detail.

And, in fact, one of the defendants, Phillips, says in their separate motion to dismiss that Phillips Electronics North America Corporation's display components division manufactured and sold tubes in the United States prior to June 2001.

So if you just listen to the presentations of the defendants and read their briefs, you would get the idea that the only thing we're talking about here is a series of hundreds of meetings that took place all overseas in order to fix a product, fix panels that are made entirely overseas and then through some convoluted process eventually get sent to the United States and that that's all we're talking about.

That's just not true, your Honor. We have alleged in much more detail than that specific facts that these companies met and that as part of the meetings that they had they agreed to fix the products that were sold in the United States, the panels that were sold in the United States, and that each of them that were there were there with all representing from their various subsidiaries and affiliates.

Now, let me talk about the pleading standards again for a minute. I think that the defendants really -- I don't even know if they pay lip service, but they certainly don't follow the rule that survives Twombly and Iqbal that the complaint should be read as a whole, not parsed out and that reasonable inferences should be drawn in the plaintiffs' favor, not the way the defendants would like to have it.

The Department of Justice said directly that this conspiracy harmed countless Americans who purchased computers and televisions using cathode ray tubes sold at fixed price.

Now, there is no doubt not just based on that statement, but based upon the allegations that we make in our complaint that the defendants' conduct was aimed at, directed at and harmed citizens of this country, consumers in this country who are the people that we

represent.

We allege in the complaint at paragraph 223 the defendants that attended the glass meetings, monitored the prices of televisions and computer monitors sold in the U.S. and elsewhere on a regular basis. The purposes and effect of investigating such retail market data was threefold. First, it permitted defendants to police the price fixing agreement, to make sure that intra-defendant CRT sales were kept at super competitive levels. Secondly, it permitted all defendants to police their price fixing agreement to independent OEM's. Finally, defendants used the prices of products to analyze whether they could increase prices or should agree to a bottom price instead.

The law is clear, your Honor, that -- and I quote here from the Kruman case 284 F. 2d. at 395. It is the effect and not the location of the conduct that determines whether the antitrust laws apply. So what is important in this case is not where the particular defendants happen to hold meetings. If that were dispositive, it would be quite simple for executives in this country to just get on a plane and fly over to Taipei and fix prices there and say, Our agreement was over there so you can't get it because what we did was legal there.

That's not the way the law works. The law is how was it implemented and was there an effect in this country, and clearly that was the case.

As far as the uniformity argument that counsel made, I would point out that it's not correct that all of the state laws are just read to be mirror images of the federal laws. As the Arc America case said, the Supreme Court case, states are free to make their own rules regardless of federal antitrust laws. And, in fact, there was a recent Ninth Circuit decision in a case called Yokoyama 2009 WestLaw 2634770 -- it was just decided about a month ago in the Ninth Circuit -- a little procedurally different, but an interesting case where the Ninth Circuit reversed a district judge in Hawaii who had denied a motion for class certification on the basis that the Hawaii plaintiffs did not meet what he perceived to be the standards for certification under Rule 23, and this was a consumer protection case. And the Ninth Circuit said you have to apply -- this is consistent with the Erie doctrine and consistent with principles of federalism, federal courts have to apply the policy directives of the state.

So, therefore, since Hawaii had a very clear mandate that they were going to read their laws expansively to protect consumers, same sort mandate, of

course, that exists in California and the other states where we are alleging damage claims here, that means that the court was in error in denying class certification by failing to account for the independent state policies that the states were free to impose, and the same principle applies here.

The preemption argument I'd refer the Court to the case of Waters v. Wachovia Bank 550 U.S. 1 at pages 35 to 36. The defendants are arguing that the FTAIA and the scope of that should preempt state laws that may be to the contrary. In the Waters case, the court said the protection of consumers in deceptive and anticompetitive business practices is a traditional exercise of state power. The presumption against preemption applies with particular force in such circumstances.

Now, we agree, I think one thing I did agree on in counsel's presentation, we agree that the FTAIA standard does apply to our Clayton injunction claim, which is a claim based in federal law. We don't agree that it applies to the claims based on state law. However, because of the evidence that I've been summarizing here of the conduct that occurred in the United States, because beyond that there was significant import commerce that is at issue in this case which the FTAIA doesn't reach and because clearly this was an

increase in prices of the consumer products was a direct, substantial and foreseeable effect of the defendant' activity, that even if the FTAIA is held to apply to the state damage claims, it's clear that our allegations are not barred by the effect of those claims.

Thank you, your Honor.

THE COURT: Rebuttal?

MR. KESSLER: I will try to be very efficient, your Honor. First, I agree that in looking as to whether or not the state harmonization laws apply or not to apply the FTAIA to the state laws as a matter of state policy, you should look to the state pronouncements. He's quite correct about that.

In Footnote 7 on page 14 of the joint motion on the indirect purchaser brief, we listed every single state statute and decision which states that the state antitrust laws of these specific states must be harmonized with the federal rule. They've given nothing in response. You've heard nothing in this argument in response and their brief has nothing to dispute those authorities.

In Footnote 8 on page 15 of our brief, we went through all the specific state statutes and cases that say their consumer protection laws must be harmonized

with the Federal Trade Commission Act in that regard. They've done nothing to do that. It is true that under Erie you have to do a state-by-state analysis, but the state-by-state analysis is completely in our favor in every single state that they have relied on for either the antitrust or the consumer protection, and I welcome your Honor to examine those authorities in Footnote 7 and Footnote 8.

Even if they had been contrary, we believe we clearly are correct, as Intel states, that contrary state law would be prohibited under the Commerce Clause and the Supremacy Clause. On the Supremacy Clause issues, I mentioned the Crosby case in the Supreme Court, which is 120 Supreme Court 2288. In that case it specifically stated, and I'm quoting from the case at 2294 (As read): And even if Congress has not occupied the field -- which we agree in antitrust Congress has not completely occupied the field -- state law is naturally preempted to the extent of any conflict with the federal statute. That's the Supreme Court.

So there is preemption to the extent that the states would even try to say they could cover overseas foreign sales. So I don't think that should be an issue.

What we come down to then is what does the

complaint say, and on this point I go with what the complaint allegations say, not with counsel's argument. So, for example, you heard counsel tell you that they have alleged that every defendant attended meetings. They mentioned U.S. subsidiaries all attended meetings to go to fix prices for either CRT's or televisions, take your pick.

There is no such allegations in this complaint. What they allege is very specifically, they allege specifics about certain foreign companies who attended foreign meetings and then in paragraph 188 they say the following (As read):

> When plaintiffs refer to a corporate family or companies by a single name in their allegations of participation in the conspiracy, plaintiffs are alleging that one or more employees or agents of entities within the corporate family engaged in conspiratorial meetings on behalf of every company in that family.

So this is a sleight of hand, your Honor. I could tell you, for example, and you'll hear this when we do the individual briefly, I represent PNA, a company that does not manufacture CRT's. It's a sales company. There is no allegation in this complaint that it ever

attended any meeting with any competitor about any product in this case, but you had counsel get up here and say, oh, no, they're all in this. Well, they're in this through this totally conclusory paragraph which does not meet any pleadings standards under Iqbal or Twombly with respect to that.

Similarly, he read to you paragraph 223. That's the same paragraph I read. I rest on your Honor reading that paragraph. There is nothing in that paragraph about any conspiracy regarding finished products. There are no agreements alleged. There's monitoring alleged, and it states why the monitoring was done. It all relates to an alleged CRT conspiracy. I stand by the words of paragraph 223. So he liked to rest on it, I'd like to rest on it.

Second, there is nothing in paragraph 223 about the United States except monitoring United States prices. There's nothing about United States CRT sales. What they state in that paragraph is that they are looking at prices for finished products in the United States. For CRT's, it says nothing about U.S. prices or price fixing for CRT's and there is nothing in the entire complaint. Again, how hard would it be if they had a basis to have one allegation to say at this meeting these defendants met and fixed prices of USC

RT's sold in the United States? They have not one allegation about that.

Finally, with respect to paragraph 63, 65, 51, 55, he gave you all these things saying we allege that they all produced, manufactured, sold, distributed CRT's and products. That's not what they allege. This is the language they use every time. Take 51 as an example. They lump everything together and they'll say -- so looking at 51 (As read): During the class period LG Electronics U.S.A., Inc., manufactured, marketed, sold -- and the lawyers -- and/or distributed CRT products. So what does that mean? We don't know from that allegation do they manufacture it, market, sell it or distribute it. It's all different. A CRT product. Is it a television, is it a monitor, is it a tube. There is no way to tell.

This is how they do every single allegation. They don't allege that the companies did it all. They let you guess and say it did one of these things between one of these products. You figure it out. That has never been the proper standard of pleading. It's certainly not the proper standard of pleading after Twombly and Iqbal.

Your Honor, this case does not have state facts for subject matter jurisdiction and at a minimum, at a

minimum, to cut this case down we implore you to write an opinion that says since they don't disagree with us that there is no basis for them to assert any claims as indirect purchasers of televisions which involve alleged price fixing of CRT's overseas just because they came in.

I should say this. He said Intel didn't hold that. I don't know what he's reading in Intel, and he was in Intel, so I don't know what he's looking at, but what Intel says is exactly what I quote as follows (As read):

> The FTAIA --
>
> And they're actually quoting Phosphorus.
>
> -- explicitly bars antitrust actions alleging restraints in foreign markets for imports that are used abroad to manufacture downstream products that may later be imported into the United States. Clearly the domestic effects of such a case, if any, would obviously not be direct, much less substantial or reasonably foreseeable.

That is dispositive of the indirect purchaser complaint as well as the direct purchaser complaint. I'm sorry, I couldn't resist that.

THE COURT: All right. What is the next